**RULES REVIEW COMMISSION MEETING**

**MINUTES**

***July 18, 2013***

The Rules Review Commission met on Thursday, July 18, 2013, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Baird Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

Staff members present were: Joe DeLuca and Amanda Reeder, Commission Counsel; Molly Masich, Dana Vojtko, Julie Edwards and Tammara Chalmers.

The meeting was called to order at 10:03 a.m. with Vice-Chairman Currin presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

**APPROVAL OF MINUTES**

Vice-Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the June 19, 2013 meeting. There were none and the minutes were approved as distributed.

Chief Administrative Law Judge Julian Mann introduced the new OAH Security officer CJ Stephens.

Commissioner Doran introduced Neal Inman and Rita Beard, interns with her office.

**FOLLOW-UP MATTERS**

**Office of Information Technology Services**

09 NCAC 06A .0101, .0102, .0103; 06B 0101, .0102, .0103, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0301, .0302, .0303, .0304, .0305, .0306, .0307, .0308, .0309, .0310, .0311, .0312, .0313, .0314, .0315, .0316, .0401, .0402, .0403, .0404, .0405, .0501, .0502, .0503, .0504, .0505, .0601, .0602, .0603, .0701, .0702, .0703, .0801, .0901, .0902, .1001, .1002, .1003, .1004, .1005, .1006, .1008, .1101, .1102, .1103, .1104, .1105, .1106, .1107, .1108, .1109, .1110, .1111, .1112, .1114, .1115, .1117, .1118, .1120, .1121, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1301, .1302, .1303, .1304, .1305, .1402 – The Commission voted to object to the rules for the reasons stated below. They also included in that vote the approval of all the rewritten – either technical changes or substantive changes – rules submitted with the condition that any changes not yet received were approved contingent upon receiving the changes by Friday, August 2. The remaining rules were approved as submitted. All the rules will have an effective date of September 1, 2013.

09 NCAC 06A and 06B (All rules submitted) -- Throughout these rules it is unclear in many cases who is responsible for making decisions or enforcing the rules. Many of the rules specify the State CIO shall take some action. For instance Rule 06A .0103 leaves it to the State CIO to establish a benchmark amount over which the “Board of Awards” must review “ITS recommended action.”

Rule 06B .0101 on the other hand states that a purchasing agency must request authorization for procurement action from “ITS” and does not mention the State CIO.

There is a definition for the State CIO which is not necessary since it is a statutory office. However there is no definition for ITS and in many cases it is not clear who makes the decision for ITS. It would also seem that the State CIO could always make an ITS designated decision since he or she is the department head. At the same time some of the rules clearly give decision making authority to ITS rather than to the State CIO or his or her delegate.

This objection applies to all rules where it is unclear who has the decision making authority.

09 NCAC 06A .0102 – The Commission objected to this rule based on the ambiguity of terms in other rules. In (11) line 11, the rule is unclear as to what “respective” offers are referred to. If it simply means any of the offers that are received, then the adjective is unnecessary and may be confusing. If that is the case it could be deleted without changing the meaning. In line 14 it is unclear what is meant by or constitutes “evaluation credit.”

09 NCAC 06A .0103 – In (f) line 18, it is unclear what constitutes or is meant by “special delegation.”

09 NCAC 06B .0301 – In (b) line 14 and (b)(2) line 30, it is unclear what constitutes or is meant by “special delegation.” The term is undefined here or in the definitions rule.

In (b)(1)(A) line 25, it is unclear what the advertising approval standards are. There is no authority to make those standards outside rulemaking.

In (b)(3), page 2 line 6, it is unclear what standards shall be used to grant “approval prior to proceeding” with the procurement process. There is no authority to make those standards outside rulemaking.

It is not clear who has the authority to make awards under this rule. Rule 06A .0103 gives either the Board of Awards or the state CIO – it’s not abundantly clear which one – the decision making role for contracts exceeding the benchmark amount. This rule in (b)(3)(C) appears to give it to either ITS – the office, or to the CIO. A related issue is that it is not clear who or what constitutes ITS decision making that is separate from the CIO. If they are not separate entities for this purpose, then it is unclear why they are both referred to and whether there is any separate function for each.

09 NCAC 06B .0309 – In (b) line 12, it is unclear what standards the State CIO is going to use to determine which agency personnel’s participation is “necessary . . . in the procurement process” so as to be entitled to possess offers and otherwise conclude the award process.

09 NCAC 06B .0314 – In (b)(1)(A), page 3 lines 5 and 6, there are no specific guidelines for ITS to use in deciding whether to waive the advertising methods required by this rule. G.S. 150B-19(6) allows an agency to waive or modify the application of any of its requirements if “a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.” There are no guidelines whatsoever in this rule.

In the objection for rule 6B .0301 there is mention of a problem with the role of the office of ITS and the role of the State CIO in making certain determinations. That problem is present in this rule in (b)(1)(A). This paragraph gives ITS waiver authority and it’s not clear who is ITS if it’s not the State CIO. What makes it even murkier is the fact that paragraph (a) gives a similar waiver authority to the State CIO in (a)(2) lines 15 and 16.

As part of the same issue is the fact that the State CIO’s waiver authority in (a)(4) is limited by the conditions in (a)(4)(A) – (F) whereas in (b)(1)(A) there is no limitation on the Office of ITS’ waiver authority.

Paragraph (b)(5), page 4 lines 13 and 14, contains a waiver, “unless otherwise directed by ITS”, without specific guidelines. Paragraph (b)(7) includes a “valid reason[s] to request a waiver in (B) and what must be included in the waiver request in (C), but there are no standards set out for what ITS shall use in determining whether to grant a waiver.

09 NCAC 06B .0316 – In (a) and throughout this rule it is unclear who or what constitutes “ITS” and the “State CIO.” As mentioned earlier the distinction or difference between the two is unclear and whether one can overrule the other is unclear.

In (a) it is also unclear what standards ITS or the State CIO will use to grant “prior approval to negotiate.”

There are also no standards in (b) line 10 for approving negotiating procedures.

09 NCAC 06B .0405 – In (a)lines 5 and 6 it is unclear what standards ITS will use to determine “acceptable” communication methods.

09 NCAC 06B .0504 – In the last sentence it is unclear what standards ITS shall use in determining whether to grant approval for a purchasing agency to exceed its delegation or delegated purchasing amount. There is no authority cited to set those standards outside rulemaking.

09 NCAC 06B .0701 – This rule, when read together with the next rule, makes it unclear whether an agency is actually prohibited from soliciting an agency specific term contract when there is a statewide term contract. Subparagraph (a)(2) contains a blanket prohibition against agencies’ purchasing “goods and services included in a statewide term contract from any other source ....” The rule continues with what appears to be a waiver “... unless authorized by the State CIO.” This would appear to allow the agency to seek an agency specific term contract, overriding the specific rule prohibition by obtaining a waiver.

However the next rule contains language that makes the existence of an “available statewide term ... contract” simply a factor to be considered in deciding whether an agency may be allowed its own term contract. It also makes it a factor for the agency, not ITS, to consider.

Aside from that issue of ambiguity, if an agency is prohibited from its own contract unless a waiver is obtained, it is unclear what the guidelines are for obtaining that waiver in (a)(2). There is no authority cited to set those waiver terms outside rulemaking.

In (a)(4) line 23, it’s unclear what standards ITS will use to grant approval for an agency to issue a solicitation for its own agency specific contract.

In (f), page 2 lines 11 and 12, it is unclear what standards or guidelines the State CIO will use in deciding whether to approve a waiver of any ITS’ standard term or condition. There is no authority cited to set the waiver guidelines outside rulemaking.

09 NCAC 06B .0702 – It is unclear whether (b) of this rule when read together with the preceding Rule .0701(a) prohibits or allows agency specific contracts when there is already a statewide term contract for a good or service. (An “agency specific contract” is a contract between a single state agency and a vendor. A “statewide” contract is a contract that applies to all state agencies and a vendor.)

Rule .0701(a)(2) contains a blanket prohibition: “No purchasing agency may purchase IT goods or services included in a statewide term contract from any other source [than the statewide contracted vendor]....” It goes on and provides the possibility for a waiver: “... unless authorized by the State CIO” (There are no guidelines for the waiver in Rule .0701, but that is a separate issue since they can be set out.)

But this rule states that one of the grounds an agency shall consider for determining “whether a good or service will be included in an agency specific contract” and the agency would be allowed to seek its own contract vendor, is an “available statewide term ... contract.” This factor’s inclusion in a list in this rule makes it seem as if it is one item to consider in deciding whether to grant an agency permission to issue its own solicitation and award its own contract. The rule in .0701 starts with a blanket prohibition.

Thus, these rules are unclear as to whether the state intends as a general rule to prohibit a separate agency contract where there already exists a statewide contract or whether that is simply one of a number of factors to consider on a case-by-case basis.

It is also unclear, as mentioned in the previous analysis, whether this is a decision for the agency to make or whether this is a decision for ITS.

09 NCAC 06B .0703 – In line 7, it is unclear what the standards are for ITS approval for the increase in value; there is no authority to set those standards outside rulemaking.

09 NCAC 06B .1102 – In (a) line 5 it is unclear what “actively and consistently” means or what constitutes “actively and consistently” responding to an offeror’s protest.

There are no standards specified for determining when the State CIO will or will not impose a penalty as set out in (g). The offense – a frivolous protest or a protest filed without any substantial basis or reasonable expectation to believe that the protest was meritorious – is set out. But there are no standards set out for when the State CIO “may” choose to use his discretion and impose it. Another way to look at it is that even though such an offensive protest may have been filed, and it is determined to be such, there is no obligation to impose the penalty. Thus, even if the authority for the penalty is there, the standards for imposing it or for the period – “up to one year” – of the bar are unclear. There is no authority cited for determining the grounds or the period outside rulemaking.

09 NCAC 06B .1103 – It is unclear what the filing and service requirements are for a contested case hearing. The rule requires a request for hearing to be filed by using the U.S. Mail. Rule .1104 defines “filing” to be placing a document or item in the “care and custody of the hearing officer and acceptance by him” which both restricts and expands the provisions of Rule .1103. It restricts the application of the previous rule by requiring “acceptance” of the paper or item. It expands the application by allowing delivery by any means that places that paper or item in the “care and custody” of the hearing officer.

Also in (3) of this rule, the definition of service includes service by other sources than the U.S. Mail required by the previous rule.

09 NCAC 06B .1104 – For the same reasons as stated in the previous rule it is unclear what constitutes “[s]ervice or serve” in (3) of this rule.

09 NCAC 06B .1121 – In (f) and (g) it is unclear what costs are referred to in each paragraph and how they are to be charged. Both paragraphs refer to “other copying costs” while (f) refers to “transcript costs” and (g) refers to costs incurred “using a professional court reporter” which would presumably include transcript costs.

It is also unclear who is to pay the cost in each case since (f) puts the charge on the party(ies) requesting the transcript and (g) makes it “apportioned equally among the parties.”

09 NCAC 06B .1201 – In (d) line 17 it is unclear whether ITS intends to state that its “departmental policy” amounts to the level of a rule or whether this means merely that this is the way a person can determine how the agency intends to apply or interpret its “policy.”

There is no authority cited to treat policy the same as a rule or to set rules by “policy” declaration.

09 NCAC 06B .1204 – In (4) line 9 it is unclear what the definition of “plainly irreconcilable” is.

Also, the agency has no authority to say that a declaratory ruling is no longer valid based on an appellate court case, at least in a case where a party to the ruling was not a party to the appellate court case. G.S. 150B-4(a) specifically addresses that issue by stating that the declaratory ruling is binding on the agency “... unless [the declaratory ruling] is altered or set aside by the court (emphasis added).”

As a general rule the only way for a specific declaratory ruling to be set aside by a court would be for the parties to the ruling to be in court over that ruling. An appellate ruling construing some statute or rule and not involving the declaratory ruling is not the basis for nullifying the declaratory ruling. If the agency feels a court ruling puts one of its declaratory rulings in jeopardy, then the solution is for the agency to take the action the APA allows: the agency can go through the process and prospectively change the declaratory ruling.

09 NCAC 06B .1206 – The rule is ambiguous in paragraph (b). There are no standards other than “for cause” set out for determining when ITS may remove or debar a vendor or for determining the period of debarment. “For cause” is a vague standard and not a sufficient guideline.

09 NCAC 06B .1303 – In lines 7 and 8 it is unclear what standards the State CIO “may [use to] approve an increase in an agency’s general delegation.” There are no standards set out in (a) or elsewhere in this rule for the CIO to use. There is no authority to set those standards outside rulemaking.

There are no standards set in (b) for when the State CIO will require “an award recommendation under such delegation [to] be sent to ITS for review....”

09 NCAC 06B .1305 – There is no authority cited for ITS to enter another agency’s premises and review its records as set out in (b) and (a) respectively without that agency’s permission and voluntary cooperation.

The rule in (c) repeats much of the content in rules .1303 and .1304. It may be unclear what the various requirements amount to or when they apply.

**Environmental Management Commission**

15A NCAC 02B .0295 – The Commission unanimously approved the re-written rule.

The Commission has received at least 10 letters of objection for this Rule and it is now subject to legislative review.

**Board of Barber Examiners**

Prior to the review of the rules from the Board of Barber Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because the law firm where she is employed provides legal services to the Board.

21 NCAC 06A .0103, .0303; 06C .0907, 06F.0101, .0116; 06H .0101; 06I .0105; 06J .0101; 06K .0104; 06L .0103; .0114, .0118, .0119; 06M .0101, .0102; 06N .0104, .0105, .0108, .0109, .0112; 06Q .0101, .0103; 06S .0101 – There was a motion to extend the period of review for these rules. Commissioners Walker, Whitaker, Doran and Currin voted in favor of the motion. Commissioners Simpson and Dunklin voted against the motion.

Bain Jones with the Board addressed the Commission

**Hearing Aid Dealers and Fitters Board:**

21 NCAC 22F .0120, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0208, .0209 – There has been no response from the agency. No action was taken on these rules.

**LOG OF FILINGS**

Vice-Chairman Currin presided over the review of the log of permanent rules.

**Private Protective Services Board**

Rules 12 NCAC 07D .0104, .0115, .0203 and .0807 - The Commission objected to these rules based on failure to complete the technical corrections requested to ensure compliance with the Administrative Procedure Act and clarify ambiguous language.

Rules 12 NCAC 07D .0301, .0302, .0401, .0501, .0601, .0807, .0901 and .0909 - The Commission objected to these rules finding the Board lacks statutory authority to abrogate the statute by requiring military spouses to have a license or experience, when both are required by G.S. 93B-15.1(b).

Further, the Commission found the Board lacks statutory authority to require military spouses to have military training to qualify for licensure pursuant to G.S. 93B-15.1(b), as set forth in Rules .0301, .0401, .0901 and .0909.

The Commission further objected to Rules .0501, .0601, .0901 and .0909 finding the Board lacks statutory authority to set higher licensure requirements for military trained applicants than those required for other applicants.

**Board of Dental Examiners**

Prior to the review of the rules from the Board of Dental Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because the law firm where she is employed provides legal services to the Board.

Prior to the review of the rules from the Board of Dental Examiners, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning these rules because of potential conflict with her husband's law firm.

21 NCAC 16A .0104 - The Commission objected to this Rule based on failure to complete the technical corrections requested to ensure compliance with the Administrative Procedure Act.

21 NCAC 16B .0101, .0317, .1001 and .1002 - The Commission objected to these rules based on failure to complete the technical corrections requested to ensure compliance with the Administrative Procedure Act and clarify ambiguous language.

In addition, the Commission objected to Rule 16B .1001, finding the Board lacked statutory authority to require that military trained applicants be actively serving in the military in order to qualify for licensure pursuant to G.S. 93B-15.1.

21 NCAC 16C .0101 and .0301 - The Commission objected to the rules based on failure to complete the technical corrections requested to ensure compliance with the Administrative Procedure Act and clarify ambiguous language.

21 NCAC 16G .0107 and .0108 - The Commission objected to both rules based on failure to complete the technical corrections requested to ensure compliance with the Administrative Procedure Act and clarify ambiguous language.

In addition, the Commission objected to Rule 16G .0107, finding the Board lacked statutory authority to require that military trained applicants be actively serving in the military in order to qualify for licensure pursuant to G.S. 93B-15.1.

21 NCAC 16M .0101 - The Commission objected to the rule based on failure to complete the technical corrections requested, which would ensure compliance with the Administrative Procedure Act and clarify questions regarding statutory authority to set a fee.

Carolin Bakewell with the Board addressed the Commission.

**G.S 150B-19.1(h) RRC CERTIFICATION**

**Department of Insurance**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 11 NCAC 11F .0505 and the repeal of rules .0501, .0502, .0503, .0504.

**Department of Labor**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 13 NCAC 13 .0401.

**COMMISSION BUSINESS**

Amanda Reeder and Molly Masich updated the Commission on H.B. 74.

Amanda Reeder updated the Commission on legislation being tracked by staff.

The meeting adjourned at 11:54 a.m.

The next scheduled meeting of the Commission is Thursday, August 15th at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings / Rules Division.

Respectfully Submitted,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission:

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Margaret Currin, Vice-Chair

